COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of New England Power Company for Approval of the Divestiture of the Seabrook Nuclear Power Station	)	D.T.E. 02-33
Petition of Canal Electric Company, Cambridge Electric Light Company and Commonwealth Electric Company for Approval Relating to the Divestiture of the Seabrook Nuclear Power Station	)	D.T.E. 02-34
The Connecticut Light and Power Company	)	D.T.E. 02-35

INITIAL BRIEF OF FPL ENERGY SEABROOK, LLC

FPL Energy Seabrook, LLC ("FPLE Seabrook") submits this Initial Brief in support of the petitions of New England Power Company ("NEP") and Canal Electric Company ("Canal"), Cambridge Electric Light Company ("Cambridge"), and Commonwealth Electric Company ("Commonwealth"; together with Canal and Cambridge, "NSTAR") for approval from the Department of the sale of their respective interests in Seabrook Nuclear Station in New Hampshire ("Seabrook Station"). In addition, FPLE Seabrook supports NEP, NSTAR and Connecticut Light and Power ("CL&P") (collectively, the "Petitioners") in their request that the Department make specific determinations, pursuant to § 32(c) of the Public Utility Holding Company Act of 1935 ("PUHCA"), that allowing Seabrook Station to become an eligible

facility: (1) will benefit consumers; (2) is in the public interest; and (3) does not violate state law.[1]

For the reasons set forth below, the Petitioners have demonstrated that the divestiture of Seabrook Station meets in full the standards established in the Electric Restructuring Act of 1997 (the "Restructuring Act") and related Department precedent regarding the sale of nuclear facilities. See Western Massachusetts Electric Company, D.T.E. 00-68 (2000). The Petitioners have also demonstrated that the Department should make the specific determinations with respect to Seabrook Station becoming an eligible facility.

Procedural History

On May 17, 2002, NEP, NSTAR and CL&P filed three separate petitions in D.T.E. dockets 02-33, 02-34 and 02-35, respectively.[2] On June 12, 2002, the Department granted petitions to intervene filed by the Attorney General and FPLE Seabrook in all three proceedings.[3] Intervenor status was also granted in all three proceedings to J.P. Morgan Securities, Inc. ("JPMorgan") for the limited purpose of addressing the treatment of confidential and proprietary materials. On June 12, 2002, the Department allowed the motion of NEP and NSTAR to consolidate the evidentiary hearings of all three proceedings.

The Department held a joint evidentiary hearing in all three dockets on July 1 and 2, 2002. The Petitioners sponsored the testimony of Paul M. Dabbar, Vice President in the Global Energy Investment Banking Group at JPMorgan. NEP sponsored the testimony of Terry L.

---

[1] CL&P's limited its petition in D.T.E. 00-35 to a request for findings pursuant to § 32(c) of PUHCA (15 U.S.C. § 79z-5a) because CL&P has no customers who are residents of Massachusetts, and therefore CL&P is not required to seek approval from the Department pursuant to c.164, § 76.

[2] In D.T.E 02-33, NEP seeks both approval under the Restructuring Act and a determination of eligible facility status under PUHCA. In D.T.E. 02-34, NSTAR seeks approval under the Restructuring Act, approval of a buyout agreement among Canal, Cambridge and Commonwealth, and a determination of eligible facility status under PUHCA. In D.T.E 02-35, CL&P seeks a determination of eligible facility status under PUHCA.

[3] The Department also allowed the motions of CL&P and NSTAR to intervene in D.T.E. 02-33 and CL&P and NEP to intervene in D.T.E. 02-34.

Schwennesen, Vice President and Director of Generation Investments for NEP. NSTAR sponsored the testimony of Robert H. Martin, Director of Electric Energy Supply and Asset Divestiture and Outsourcing for NSTAR Electric & Gas Corporation. CL&P sponsored the testimony of Donald M. Bishop, Manager of Regulatory Policy Massachusetts for Northeast Utilities Service Company.

Background of the Seabrook Sale

The Petitioners offered their respective shares of Seabrook Station for sale as part of a public auction that included the shares of other joint owners. Each of the joint owners of Seabrook Station, except for the Massachusetts Municipal Wholesale Electric Company, the Taunton Municipal Lighting Company and the Hudson Light & Power Department, offered their joint ownership interest for sale.[4] In total, the selling joint owners offered an 88.23% ownership interest in Seabrook Station for sale at public auction.

JP Morgan conducted the auction in accordance with New Hampshire Revised Statutes (Annotated) ("RSA") 369-B:3, IV(b)(13) and Connecticut General Statutes § 16-244g ("CT Act"). The auction was supervised by the Commission Staff of the NHPUC and the Connecticut Department of Public Utility Control's ("CTDPUC") Utility Operations and Management ("UOMA") unit. (Exh. NEP-2, at 3-5).

[4] According to Exh. NEP-2 at 5, the Selling Owners of Seabrook and their approximate respective ownership interests are:

North Atlantic Energy Corporation--35.98%
The United Illuminating Company--17.50%
Great Bay Power Corporation--12.13%
New England Power Company--9.96%
The Connecticut Light and Power Company--4.06%
Canal Electric Company--3.52%
Little Bay Power Corporation--2.90%
New Hampshire Electric Cooperative, Inc.--2.17%

On April 13, 2002, JPMorgan announced that FPLE Seabrook was the winning bidder. FPLE Seabrook entered into a Purchase and Sale Agreement (the "PSA") for the purchase of Seabrook Station on the same date. Pursuant to the terms of the PSA, FPLE Seabrook agreed to purchase the selling joint owners' 88.23% interest in Seabrook Station for a total price of approximately $836 million, subject to adjustments at closing.

I. THE SALE OF SEABROOK STATION IS CONSISTENT WITH THE RESTRUCTURING ACT AND THE PETITIONERS' RESTRUCTURING PLANS.

A. Standard of Review

The Department has held that in reviewing a company's proposal to divest its generating units, the Department must consider the requirements of the Restructuring Act and whether the divestiture is consistent with that company's restructuring plan or restructuring settlement. Although NSTAR's restructuring plan and NEP's restructuring settlement differ, the Department has held that "[a] divestiture transaction will be determined to be consistent with the company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the 'sale process is equitable and maximizes the value of the existing generation facilities being sold.'" Western Massachusetts Electric Company, D.T.E. 00-68 at 6, quoting c.164, § lA(b)(1). The process leading to a sale "will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold if the company establishes that it used a 'competitive auction or sale' that ensured 'complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale.'" Western Massachusetts Electric Company, D.T.E. 00-68 at 6, quoting c.164, § 1 A(b)(2).

B. The Process for the Sale of Seabrook Station Ensured Complete, Uninhibited, Non-Discriminatory Access to All Data and Information by All Parties Seeking to Participate in the Sale.

Similar to the auctions approved by the Department in Western Massachusetts Electric Company, D.T.E. 00-68; Boston Edison Company/Commonwealth Electric Company, D.T.E. 98-119/126 (1999); Cambridge Electric Light Company et al., D.T.E. 98-78/83 (1998); and Boston Edison Company, D.T.E. 97-113 (1998), the auction of Seabrook Station provided market participants with open and non-discriminatory access to all relevant information (Exh. NEP-2, at 19). The auction process was conducted under the supervision the NHPUC Staff and the CTDPUC's UOMA unit. JPMorgan worked closely with the NHPUC Staff and the UOMA unit throughout the auction and apprised both the NHPUC Staff and the UOMA unit fully of all auction activities (id. at 4).

As explained by Paul Dabbar, the Seabrook auction began with an information-gathering stage, during which JPMorgan solicited interest from entities known or believed to be potential bidders based upon their previous public statements, their position in the industry or their participation in recent sales of nuclear assets (Exh. NEP-2, at 6). JPMorgan solicited interest from a broad array of potential bidders in the energy industry, including existing nuclear plant operators and generating companies (id. at 6). JPMorgan prepared a preliminary letter and a press release to notify all potential bidders of the auction.

JPMorgan structured the auction to provide all participants with complete, uninhibited, non-discriminatory access to all data and information (id. at 7-8). Concurrently with the solicitation efforts described above, JPMorgan prepared a confidential Offering Memorandum ("OM") that described the assets and the auction in detail (id. at 6). JPMorgan provided the OM to potential bidders who met the requirements established by JPMorgan for eligibility to participate in the auction (id. at 8). Eligible bidders also were given access to an electronic "data

room" that was set up for the auction on a secure Internet site. The electronic data room contained the documents that were compiled for the sale process and a list of answers to "frequently asked questions" regarding Seabrook Station. Bidders were also invited to submit confidential questions regarding the assets to JPMorgan via the electronic data room site (id. at 8). During the due diligence phase, bidders were given access to Seabrook management representatives and had the opportunity to make a site visit (id. at 6-7).

These procedures were virtually identical to those approved by the Department in Western Massachusetts Electric Company, D.T.E. 00-68; Boston Edison Company, D.T.E. 98-119/126 ; Cambridge Electric Light, D.T.E. 98-78/83; and Boston Edison Company, D.T.E. 97-113. The sale of the Petitioners' Seabrook shares that resulted from use of those procedures likewise should be approved by the Department under the Restructuring Act and c.164, § 76.

C. The Seabrook Auction Maximized the Sales Value of Seabrook Station.

As described by Mr. Dabbar, JP Morgan maintained a high level of competition throughout the auction process and insisted upon strict confidentiality restrictions among participants in order to raise bidding tension (Exh. NEP-2 at 12). Mr. Dabbar testified that the final sale price of approximately $836 million represents a substantial net benefit to ratepayers, translating to a price of approximately $792/kilowatt ("kW") of capacity purchased for Unit 1 (id. at 19). In addition, Mr. Dabbar and Ms. Schwennesen testified that because the Petitioners' shares were sold as part of a bloc that will allow FPLE Seabrook to control the operations of Seabrook Station, the Petitioners received the maximum price for their shares (Tr. 54, line 1; Tr. 120, line 11). Conversely, if the sale were not approved and the Petitioners were required to sell their shares separate from the FPLE Seabrook transaction, the price they would receive would reflect a discount inherent in selling a minority, instead of a controlling, bloc of shares (id.). The

JPMorgan auction thus presented the best opportunity for the Petitioners to maximize the value of their shares.

The auction also provided a fair market test for the value of Petitioners' shares in Seabrook Station. In Boston Edison, D.T.E. 98-119 at 26, the Department held that "[a]n open, rational, transparent, and fairly managed auction tests the market for, and value of, an asset at the time of the offering. The bid results of such a market test under proven, fair conditions are strong evidence of an asset's worth." (Citation omitted.) As shown in section I.B above, the Seabrook auction meets Boston Edison's test of a fair auction, and thus provides the best evidence of the maximum value of the Petitioners' Seabrook shares.

The same presumption of maximization that applies to the price paid by the winning bidder in a properly conducted auction also applies to the specific terms to which the winning bidder agrees in the final purchase and sale agreement for the assets. JPMorgan circulated the draft Seabrook Station PSA to all potential bidders as part of the Prototype Transaction Documents. The draft PSA represented the terms under which the Petitioners offered their shares for sale (Exh. NEP-2, at 8). Accordingly, the bidders, including FPLE Seabrook, based their bids in part upon the terms of the draft PSA. The Department has recognized that a PSA that results from a fully informed and fully competitive auction should not be altered after the fact. In responding to an argument from the Attorney General in Boston Edison, D.T.E. 98-119, the Department observed:

> To implement the Attorney General's proposal to condition the approval of the divestiture transaction on the contingent liability of Entergy Holding for any future decommissioning shortfall, the Department would, in effect, be restructuring the divestiture transaction. Entergy's bid is the product of a competitive process, and to condition the sale on a guarantee by the parent company would change the bargained-for terms of the transaction. The Restructuring Act's divestiture provisions are grounded in the premise that a fair and open market-test is a better determinant of asset value than an administrative

> determination. We have had such a test for Pilgrim. Only upon the most compelling showing would the Department supplant the results of a market-test.

Id. at 29. Accordingly, since the bargained-for terms of the PSA between the Petitioners and FPLE Seabrook are the result of a properly conducted market test, the Department should approve the transaction as incorporated in the PSA negotiated by FPLE Seabrook and the selling joint owners.

It is uncontroverted that JPMorgan developed and implemented a comprehensive and competitive sale process for Seabrook Station, and that JPMorgan provided all participants with complete, uninhibited, non-discriminatory access to all data and information. In addition, the Petitioners were able to maximize the total value of their shares in Seabrook Station by offering them for sale in a fully competitive public auction that granted control to the wining bidder. Accordingly, the record shows that the Petitioners' divestiture of Seabrook Station fully complied with the requirements of the Restructuring Act because, as required by c.164, § lA(b)(1), "the sale process is equitable and maximizes the value of the existing generation facilities being sold…."

II. THE DEPARTMENT SHOULD MAKE A SPECIFIC DETERMINATION THAT ALLOWING SEABROOK STATION TO BECOME AN ELIGIBLE FACILITY WILL BENEFIT CONSUMERS, IS IN THE PUBLIC INTEREST; AND DOES NOT VIOLATE STATE LAW.

Section 32(c) of PUHCA, in relevant part, states:

> If a rate or charge for, or in connection with, the construction of a facility, or for electric energy produced by a facility (other than any portion of a rate or charge which represents recovery of the cost of a wholesale rate or charge) was in effect under the laws of any State as of the date of enactment of this section, in order for the facility to be considered an eligible facility, every State commission having jurisdiction over any such rate or charge must make a specific determination that allowing such facility to be an eligible facility (1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law; Provided, That in the case of such a rate or charge which is a rate or charge of an affiliate of a registered holding company:

> (A) such determination with respect to the facility in question shall be required from every State commission having jurisdiction over the retail rates and charges of the affiliates of such registered holding company; . . .

Consistent with Department precedent, and based on the undisputed facts in this case, the Department should make the requested determination that allowing Seabrook Station to be an "eligible facility" will benefit customers, is in the public interest and does not violate state law.

The sale of Petitioners' shares of Seabrook Station was accomplished through a competitive auction that ensured complete, uninhibited, non-discriminatory access to all data and information by all participants. As shown in section I.B above, the results of such a competitive auction are deemed to satisfy the requirements of the Restructuring Act. See Cambridge Electric Light Company, D.T.E. 98-78/83, at 3-4 (1998), citing G.L. c.164, § 1A(b)(1). As a result, the sale of Seabrook Station will maximize the mitigation of generation-related stranded costs that Massachusetts ratepayers would otherwise pay as transition costs, thereby providing a direct benefit to those ratepayers.

The sale of the Petitioners' shares of Seabrook Station also is in the public interest and does not violate state law. The Petitioners' divestiture of their Seabrook interests comports with the policies established by the Department in D.P.U./D.T.E. 96-100 and by the Legislature in the Restructuring Act. In D.P.U./D.T.E. 96-100, the Department found that an expedient and orderly transition from a regulated generation market to one of customer choice, marked by open competition in the generation sector, would best serve the interests of Massachusetts ratepayers. D.P.U./D.T.E. 96-100, at 8 (1998). The divestiture of Seabrook Station will further these goals, leading to greater competition in the generation market and additional opportunities for customer choice.

The divestiture of Seabrook Station is also consistent with the requirement of the Restructuring Act that Massachusetts electric companies mitigate their stranded costs. Under the Restructuring Act, any electric company wishing to recover transition costs is required to mitigate these costs, even if mitigation requires sales of generation facilities. See G.L. c.164, §§ 1, 1G(d)(1). The sale of Seabrook Station is consistent with these goals and thereby furthers the policy goals of the Commonwealth. In addition, FPLE Seabrook must obtain a determination of EWG status under § 32(c) of PUHCA as a condition to closing its purchase of Seabrook Station. Without such a finding, ratepayers of the current owners of Seabrook will not benefit from the sale.

The determination sought by Petitioners from the Department is identical to those sought and obtained by CL&P in D.T.E. 99-80 (sale of certain CL&P assets to NRG Energy, Inc. and Northeast Generation Company) and in D.T.E. 00-69 (sale of CL&P assets in Millstone 1, 2, and 3 to Dominion Nuclear Connecticut, Inc.) as well as NSTAR in Cambridge Electric Light Company, D.T.E. 98-78/83 (sale of generating assets to Southern Energy New England, LLC). In its final order in D.T.E. 00-69, the Department found that the sale by CL&P of its interest in the Millstone units would benefit consumers and the public interest by furthering the Restructuring Act's goal of developing a competitive wholesale generation market.

> The record indicates that a designation of the assets as EWGs would contribute to the development of a competitive wholesale generation market and is, therefore, in the public interest … [B]ecause competing wholesale generators will be an integral part of the competitive generation industry that the Act was designed to enable, the Department finds that the designation of the Petitioners assets as an EWG does not violate state law, but rather, furthers the objectives of the state law.

D.T.E. 00-69 at 4. The Department has made similar findings in several other divestiture-related proceedings involving requests for findings under § 32(c). See Western Massachusetts Electric

Company, D.T.E. 99-74, at 12-14; Western Massachusetts Electric Company, D.T.E. 99-29, at 13-15 (1999); Fitchburg Gas and Electric Light Company, D.T.E. 98-121, at 11-13 (1999); Connecticut Light & Power Company, D.T.E. 99-80, at 5-7 (1999); Eastern Edison Company and Montaup Electric Company, D.T.E. 99-9, at 19-20 (1999).

CONCLUSION

For all of the reasons stated above, FPLE Seabrook respectfully request that the Petitions for the sale of Seabrook Station be approved and that the Department make specific determinations that allowing Seabrook Station to become an eligible facility as defined in § 32 of PUHCA (1) will benefit consumers, (2) is in the public interest, and (3) does not violate state law.

FPLE SEABROOK, LLC

By its attorneys,

_____

E. Randolph Tucker
Michael D. Vhay
Sean K. McElligott
HILL & BARLOW,
a Professional Corporation
One International Place
Boston, MA 02110
(617) 428-3000

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed via first-class mail, postage pre-paid, to all counsel and parties of record, on this 31st day of July 2002.

_____

Michael D. Vhay

P_KK02_.DOC (850580 v. 2)